



STATE OF INDIANA

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August 3, 2011

Mr. Larry Thomas
Communications Director
City of Jeffersonville
Via email: lthomas@cityofjeff.net

Re: *Informal Inquiry 11-INF-41; City of Jeffersonville*

Dear Mr. Thomas:

This is in response to your informal inquiry regarding the City of Jeffersonville ("City"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

Your inquiry seeks an opinion regarding a July 26, 2011 records request that the City received from the News and Tribune ("News") seeking the appraisal of a property that the City is considering purchasing. On July 27, 2011 you replied to the News via email and declined the records request pursuant to IC 5-14-3-4(b)(6). The City has maintained that a decision to purchase the property has not been made and discussions are ongoing with the property owner. The appraisal was conducted at the request of the City in order to provide an opinion as to the property's value. Although the City did not cite in their written denial to the News, you have cited IC 5-14-1.5-6.1(b)(2)(D), which permits a public agency to meet in executive session for the purpose of discussing strategy with regard to the purchase or leasing of real property, up to the time that a contract or option to purchase is executed. The City has maintained that upon the execution of a purchase agreement or if an agreement can not be reached, a copy of the appraisal will be made available to the News.

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). Here, the City responded to the request within the seven-day period, cited to a specific exemption authorizing to the withholding or all or part of the record, and provided the name and title of the person responsible for the denial.

Under the APRA, a public agency that withholds a public record bears the burden of showing that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. The City cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose a copy of the appraisal to the News. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

The deliberative materials exception requires that the records be expressions of opinion or are speculative in nature and communicated for the purpose of decision making. The City maintains that the appraisal was prepared at their request in order to provide an opinion as to the property's value. The City has further provided that a decision to purchase the property has not been made. Accordingly, it is my opinion that the record qualifies as intra-agency deliberative material under I.C. § 5-14-3-4(b)(6) and the City did not violate the APRA by withholding it.

I would note that the APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). In *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that Ind. Code § 5-14-3-6(a) requires an agency to separate disclosable information from the nondisclosable information where the two types of information are not "inextricably linked." *Id.* at 914. Thus, if any of the records at issue here contain factual information along with the deliberative material, the APRA permits the City to withhold

the factual material only if it is inextricably linked with the deliberative material. Otherwise, the City should redact the deliberative material and produce the remainder of the record. *See Op. on the Public Access Counselor 11-FC-83.*

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor